United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

original

76-7003

United States Court of Appeals

FOR THE SECOND CIRCUIT

MARGARET TOWNSEND,

Plaintiff-Appellee,

—against—

NASSAU COUNTY MEDICAL CENTER: DOCTOR DONALD H. EISENBERG, SUPERINTENDENT, NASSAU COUNTY CIVIL SERVICE COMMISSION: GABRIEL KOHN, Chairman: EDWARD S. WITANOWSKI, EDWARD A. SIMMONS, ADELE LEONARD, Executive Director of NASSAU COUNTY CIVIL SERVICE COMMISSION; NEW YORK STATE DEPARTMENT OF CIVIL SERVICE; ESRA H. POSTEN, President of the NEW YORK STATE CIVIL SERVICE COMMISSION and head of the NEW YORK STATE CIVIL SERVICE DEPARTMENT,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR NASSAU COUNTY DEFENDANTS-APPELLANTS

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Preliminary Statement

Plaintiff-Respondent Margaret Townsend has commenced this action pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et. seq.*), 42 U.S.C. 1983 & 42 U.S.C. 1985, alleging that the requirement of either a bachelor of science degree or certification from the American Society of Clinical Pathologists for the position of

medical technologist I at the Nassau County Medical Center constitute a discriminatory employment practice in violation thereof.

The Court below, while it did not rule on the validity of the aforementioned qualifications as they apply to blacks generally, found that the qualifications as applied to plaintiff-respondent herein operated as a discriminatory employment practice in violation of Title VII.

Statement of Facts

On June 22, 1965, Plaintiff-Respondent Margaret Townsend (hereinafter "respondent") commenced work at the Nassau County Medical Center (hereinafter "NCMC") (A. 65).* Respondent was appointed to the position of laboratory technologist I (A. 66-67). As a result of an evaluation survey conducted by the firm of Cresap, McCormick & Paget, respondent was reclassified as a provisional medical technologist I in July 1967 (A. 68, 95). The aforementioned evaluation study, which commenced in 1965, was an undertaking to reclassify all civil service positions within Nassau County (A. 195-196, 200-201).

As a result of the Cresap, McCormick and Paget survey, the new job specifications and qualifications for the position of medical technologist I became effective in July of 1967 (A. 200). A bachelor of science degree or certification by the American Society of Clinical Pathologists (hereinafter "ASCP"), in addition to passing a competitive examination, became prerequisites for the position of medical technologist I (A. 250). Although respondent had neither a bachelor of science degree nor ASCP certification, she was permitted to take the competitive examination for the

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* Refers to page numbers in Joint Appendix.

position of medical technologist I which was given on December 4, 1971 (A. 80). Had respondent passed this examination, she would have been accorded permanent status as a medical technologist I, as was Mr. Allen Scimeca (A. 161-162), regardless of whether or not she possessed any formal degrees or certification (A. 168). However, respondent failed the examination, having passed only that part of the examination dealing with blood banking (A. 371).

There is no doubt that respondent performs her work in the blood bank laboratory in a competent manner. She is highly regarded by the supervisor of the blood bank laboratory, Mr. Frank Applewaite, who like respondent is black (A. 131, 142). Specifically, respondent works as a phlebotomist in the blood bank laboratory (A. 138). Of the fourteen persons who work in the blood bank laboratory under the supervision of Mr. Applewaite, only three or four persons have a medical technologist title (A. 133, 144). It appears that all the persons in the blood bank laboratory, except for the supervisor and assistant supervisor, perform the same duties, regardless of title (A. 133, 151, 174).

Even though she did not pass the examination in December, 1971; respondent was permitted to continue in the position of provisional medical technologist I because the eligible list promulgated as a result of the 1971 examination did not contain a sufficient number of names to fill all vacancies (A. 292).

A second examination for medical technologist I was held in April, 1973 (A. 293). Respondent's application to take this examination was rejected by appellant Civil Service Commission because she lacked the prerequisites (i.e. bachelor of science degree or ASCP certification)

for the position (A. 82). Respondent was discharged on December 31, 1973 with three other provisional medical technologists I, all of whom were white (A. 34; see *Milson* v. *Leonard,* E.D.N.Y., docket no. 74 C 904), as a result of the promulgation of a medical technologist I eligible list based upon the 1973 examination (A. 293). Respondent was rehired by NCMC in March, 1974 as a laboratory technician II, a lower graded classification than medical technologist I (A. 86).

The position of medical technologist I is utilized in all laboratories within NCMC, and is not limited to the blood bank laboratory (A. 148, 350). The job specification for medical technologist I, which came into being as a result of the Cresap, McCormick & Paget survey, was intended by those taking part in the survey to encompass duties in each and every laboratory within NCMC (A. 222).

Respondent brought this action pursuant to 42 U.S.C. 2000e *et seq.* by summons and complaint dated February 25, 1975 (A. 5). Respondent's motion for a preliminary injunction was denied by order dated May 9, 1975 (A. 2). By decision dated December 8, 1975, the Court below found that the prerequisites for the position of medical technologist I (i.e. bachelor of science degree or ASCP certification), while they do not operate to discriminate against blacks generally have operated to discriminate against the respondent solely because of her race, in violation of 42 U.S.C. 2000e *et seq.*

Questions Presented

1. Whether, pursuant to Title VII, respondent proved a prima facie case of race discrimination?

The Court below answered in the affirmative.

2. Whether appellants met their burden of persuasion by proving that the qualifications for employment disputed herein are job-related?

The Court below answered in the negative.

3. Whether a bona fide Title VII issue was presented by respondent, or rather, did the Court below act in violation of the New York State Civil Service Law?

The Court below did not direct itself to this question.

4. Whether respondent is entitled to an award of back pay?

The Court below answered in the affirmative.

5. Whether the attorney for respondent is entitled to an award of attorney's fees?

The Court below answered in the affirmative.

POINT I

The Court below erred in finding that respondent proved a prima facie case of race discrimination.

The Court below clearly erred in finding that statistical evidence of educational disparity, standing alone, is sufficient to establish a prima facie case of race discrimination pursuant to Title VII of the Civil Rights Act of 1964 (42 USC 2000e, et seq.). It is contended by appellants as follows: First, that a prima facie case of race discrimination pursuant to Title VII does not exist until plaintiff has demonstrated, through the introduction of competent evidence, the appearance of a pattern of past discriminatory employment practices. Second, "plus factors" in addition to statistical evidence of educational disparity are required before a pattern of racial discrimination appears. Third, the statistical evidence of educational disparity which respondent introduced at trial is far too general to show any appearance of racial discrimination.

A pattern of past discriminatory practices must appear from the evidence introduced by a Title VII plaintiff at trial. In *Gresham* v. *Chambers,* 501 F.2d 687 (2d Cir. 1974) the Court stated at pages 691, 692:

> "Only upon a showing of unlawful discrimination will formal open recruiting or some other recruiting method be mandated in lieu of word-of-mouth recruiting. Where a pattern of past discrimination appears, recruitment procedures that might otherwise be classified as neutral will no longer be accepted as non-discriminatory. Additional methods must then be devised to compensate for the effects of past discriminatory practices and to guard against their perpetuation or recurrence. Rios v. Enterprise Association Steamfit-

ters Local 638, et al., 501 F.2d 622, 629 et seq. (2d Cir. 1974); United States v. Georgia Power Company, 474 F.2d 906 (5th Cir. 1973); Brown v. Gaston County Dyeing Machine Company, 457 F.2d 1377 (4th Cir.), cert. denied, 409 U.S. 982, 93 S. Ct. 319, 34 L. Ed.2d 246 (1972); Rowe v. General Motors Corporation, 457 F.2d 348 (5th Cir. 1970); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970). However, absent such a showing, word-of-mouth recruiting will not be barred.

In the present case appellant has failed to prove that a pattern of discrimination against blacks existed at the College. On the contrary the evidence established, and Judge Dooling found, an absence of any such discrimination, purposeful or otherwise."

See as well *Bridgeport Guardian, Inc.* v. *Members of Bridgeport Civil Service Comm.*, 482 F.2d 1333, 1335 (2d Cir. 1973); *Vulcan Society of N.Y. Fire Dept. Inc.* v. *Civil Service Comm.*, 490 F.2d 387, 391 (2d Cir. 1973).

The Congressional objective underlying Title VII, as summarized by the Supreme Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 28 L. Ed.2d 158, 91 S.Ct. 849 (1971) is in complete accord with the principle that a pattern of prior discriminatory employment practice is essential to establish a prima facie case of racial discrimination. The Court therein noted, at 401 U.S. 429-430, 28 L.Ed.2d 163, as follows:

"The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities *and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.* Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms

of intent, cannot be maintained *if they operate to 'freeze' the status quo of prior discriminatory employment practices.*" (emphasis added)

See as well *Equal Employment Opportunity Commission, and The City of New York* v. *Local 638, et al.*, Docket Nos. 75-6079, 6093, fn. 4 at page 2487 (2nd Cir. 1976), *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 427-428 (8th Cir. 1970); *Harper* v. *Trans World Airlines, Inc.*, 525 F.2d 409 (8th Cir. 1975); *Kaplan* v. *Int'l Alliance of Theatrical and Stage Emp. and Motion Picture Mach. Operators of U.S. and Canada*, 525 F.2d 1354, at 1358, 1360 (9th Cir. 1975).

Clearly, then, a Title VII plaintiff who fails to show the existence of prior discriminatory employment practices fails to establish a prima facie case of race discrimination. The Court below noted the marked dissimilarity between *Griggs* v. *Duke Power Co., supra,* and the present case when it stated as follows in the closing statement to counsel:

"But we have a situation here where there isn't the slightest evidence of racial discrimination and intentionally. (sic)

"Counsel have all agreed on that from the outset.

"There was no history of racial discrimination in this department or in the hospital.

It is quite unlike the Griggs case in that respect.

"The Griggs case had a long history of racial discrimination." (A. 283).

The Court below relied upon *United States* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973) and *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1361 (5th Cir. 1974) for the proposition that statistics showing general, educational disparity are sufficient to establish a prima facie

case of race discrimination. (A. 298-299). However, it was noted by Chief Judge Taylor in *Badillo* v. *Dallas City Community Action Com. Inc.*, 394 F.Supp. 694 (N.D. Tex. 1975), after a thorough study of Title VII cases in the Fifth Circuit, as follows:

> "From an examination of the Fifth Circuit opinions dealing with 'discrimination statistics,' one receives the impression that a plaintiff's ability to establish a prima facie case will usually depend upon other factors or evidence of an employer's discriminatory conduct in addition to statistical evidence. In most if not all cases where the burden of proof has shifted, *'plus factors' of an employer's discriminatory policies* —such as a biased seniority system or testing program—have been present." 394 F. Supp. at 706. (emphasis added).

See as well *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, at 225 (5th Cir. 1974). *Rodriguez* v. *East Texas Motor Freight*, 505 F.2d 40, 53-54 (5th Cir. 1974). "Plus factors" in addition to the type of statistical evidence introduced by respondent at trial which shine the light of day upon an employer's discriminatory policies are required before the burden of persuasion shifts to the employer.

General statistical data showing educational disparity between the races is not sufficient, of itself, to bring about the appearance of a pattern of past discrimination. The Court below had difficulty finding the logical connection between discriminatory employment practices and the statistical data of educational disparity introduced by respondent below. The Court noted as follows:

> "So, I just don't think this kind of general statistical information is sufficient. I don't for example have any

idea of what the ratio breakdown is in Nassau College or in the various colleges that are preparing people for these jobs.

You may have it, but insofar as I can tell here, it may well be discrimination runs the other way. I just don't know. I just say they can't on the basis of your statistical data, draw any conclusions." (A. 180).

The Court below further noted,

"My problem is whether you have made out a case based on race. Now, I do not see it, that you have based it upon these particulars, it's just too thin." (A. 182).

Evidently, a pattern of employment discrimination did not emerge from the statistics of educational disparity respondent introduced at trial. The Court below observed as follows:

"The Court: I don't believe you've shown it. Not with respect to this particular area. This may be a particular area where blacks find it more attractive than where whites do, where they don't find it attractive for variety of reasons. I don't know. But, we know that there's perhaps a basis for believing there are a larger proportion of blacks in this field than there are in the population generally.

"Including those who are certified and have these higher positions. So, I am not going to make any logical jumps from these general statistics. I find it a troublesome case. I will see you at 1:30." (A. 188-189).

Cf. *Keely* v. *Westinghouse Electric Corp.*, 404 F.Supp. 573, 578-579 (E.D. Mo., 1975), where statistical data introduced

at trial was too specific to show discriminatory employment practices.

The Tenth Circuit follows the rule that, in order to establish a prima facie case of race discrimination, statistical data proferred by the plaintiff should be closely related to the specific issues presented. *Rich* v. *Martin Marietta Corp.*, 522 F.2d 333, 346 (1975); *Taylor* v. *Safeway Stores, Inc.*, 524 F.2d 263, 272 (1975); *Olson* v. *Philco Ford*, —— F.2d ——, 11 EPD 10,730 (Feb. 27, 1976). This rule should be followed in the case at bar, where the statistics introduced by respondent failed to show any discrimination, purposeful or otherwise. Cf. *Jones* v. *New York City Human Resources Admin.*, 528 F.2d 696, 698 (2d Cir. 1976), where the statistical data was closely related to the specific issues at bar.

It is abundantly clear that in the case at bar there is no racial discrimination, subtle or otherwise. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 801, 36 L. Ed.2d 668, 677, 93 S.Ct. 1817 (1973). Respondent failed to show any history of discriminatory practices at NCMC (A. 283). The supervisor of the medical technologists and lab technicians who work in the blood bank laboratory is black (A. 129). Finally, respondent was dismissed with three, white provisional medical technologists who, like respondent, were not permitted to take the competitive examination for medical technologist I because they lacked the prerequisite qualifications for the position (A. 34). Therefore, it is respectfully submitted that the finding by the Court below that respondent established a prima facie case of race discrimination is clearly erroneous and justifies reversal.

POINT II

Assuming, arguendo, that respondent established a prima facie case, thereby creating a rebuttable presumption and shifting the burden of persuasion, appellants nevertheless met their burden with sufficient evidence of job relatedness.

Assuming plaintiff has proven a prima facie case of race discrimination, it is encumbent upon the employer to come forward and show that its mode of selection for the desired position ". . . is in fact substantially related to job performance." *Vulcan Society of N.Y. City Fire Dept., Inc.* v. *Civil Service Comm., supra,* at 393; *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 432, 28 L. Ed.2d at 165.

While the employer has no obligation to come forward with proof of job-relatedness of its selection criteria until the plaintiff has proven a prima facie case, it must be determined at the outset precisely what are the duties and job specifications entailed in the desired position. Respondent herein alleges that the employment practices of appellant with regard to the position of medical technologist I are discriminatory in that a Bachelor of Science degree or ASCP certification is required of all candidates for that position. The job specification for medical technologist I calls for availability in all eleven laboratories within NCMC and is not limited to the blood bank laboratory (A. 350-351).

The Court below erred in its criterion and content validation analysis in that its analysis was limited to performance in the blood bank (A. 302-303). The job specification for medical technologist I calls for knowledge and skill in all of the various laboratories contained in NCMC (A. 148, 222); any validation study, to be proper, should be based

upon the job specification as a whole and not upon only one aspect of the job specification. Should respondent be accorded the position of medical technologist I, she could be freely transferable to any laboratory in NCMC on a purely administrative basis.

In order to show that the requirement of a bachelor of science degree or ASCAP certification for the position of medical technologist I is job-related, appellant relied, for the most part, upon a reclassification scheme for the entire civil service of Nassau County prepared for appellant by the firm of Cresap, McCormick & Paget (Defendant's Exhibit "A", A. 372 *et seq.*). In order to arrive at the qualifications for what was to become the position of medical technologist I, those conducting the survey relied upon questionnaires which were given to employees in all departments of NCMC (A. 197-198), including at least three employees in the blood bank laboratory (A. 220, 237). Recommendations were also sought from each and every supervisor and department head (A. 199-200, 220). In addition, research was done as to similar positions in other jurisdictions, so that a point of reference could be established and those conducting the survey would not be forced to rely solely upon the subjective viewpoints of department heads, supervisors and employees (A. 200, 221, 251-252). For example, the United States Department of Labor, New York City and New York State require a bachelor of science degree or ASCP certification from their candidates for medical technologist positions. (A. 251-256). See Defendant's Exhibits "B," "C" and "D." Finally, in arriving at the job qualifications for the position of medical technologist I, those who conducted the survey based the qualifications upon duties which could be performed in all the laboratories in appellant hospital, and not merely for assignment to the blood bank laboratory (A. 222).

The position of medical technologist in a hospital involves specialized skills and is considered to be a "professional" position (A. 350; 407-422). The corresponding human risk factor for such a position is relatively high. For example, a mistake by a medical technician who is working in the blood bank laboratory can be the cause of a patient disease or fatality (A. 58). Where a hospital job, such as medical technologist, involves a high human risk factor, the Equal Employment Opportunity Commission has determined that an employer's burden to prove that its qualification is job related is significantly less than where the job involves little or no human risk. 29 C.F.R. 1607.5(c)(2)(iii) states as follows:

> "(iii) The smaller the economic and human risks involved in hiring an unqualified applicant relative to the risks entailed in rejecting a qualified applicant, the greater the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when the former risks are relatively high."

The Tenth Circuit, in *Spurlock* v. *United Airlines Inc.*, 475 F.2d 216 (1972) has explained the employer's burden of persuasion of job-relatedness in cases such as the present as follows:

> "When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the courts should examine closely any pre-employment standard or criteria which discriminate against minorities. In such a case, the employer should have a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job-related. On the other hand, when the job clearly requires a high degree of skill and the economic

> and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related." 475 F.2d at 219.

See as well, *Hodgson* v. *Greyhound Lines, Inc.*, 499 F.2d 859, 862 (7th Cir. 1974). Considering the skill, talent and human risk factors involved in the hospital position of medical technologist, the mode utilized by appellant Civil Service Commission in determining the necessary qualifications for that position was clearly sufficient to meet its burden of showing job-relatedness. The methods of criterion related validation and content validation should not be woodenly applied in the case at bar where high risks in life and death hospital situations are a daily routine (A. 302-303).

The job specification for medical technologist I encompasses duties in all laboratories in NCMC. This is borne out, in part, by the examination for the position which respondent was permitted to take on December 4, 1971 (A. 80). This examination, which respondent failed, is presumably valid since respondent made no allegations that it was in any way discriminatory (A. 186-187). The examination was divided into four subjects: Clinical chemistry, microbiology, bloodbanking and hematology (A. 371). The only section of the examination in which respondent received a passing grade was that section dealing with bloodbanking. Had respondent passed this examination, she would have been classified as a permanent medical technologist I, regardless of her lack of education (A. 168, 184).

Since, first, "grandfather rights" were retained by civil service employees of Nassau County who were employed at the time the new qualifications for medical technologist

I became effective (M. 133, 149), and second, the position of medical technologist I calls for skills in areas other than bloodbanking, *Berger* v. *Board of Psychologist Examiners,* 521 F.2d 1056 (D.C. Cir. 1975), which was heavily relied upon by the Court below, is clearly distinguishable from the case at bar. Furthermore, the decision in *Berger, infra,* involved a District of Columbia statute in violation of the Due Process Clause of the Fifth Amendment which set forth an "irrefutable presumption" and denied current practitioners grandfather rights. 521 F.2d at 1063. Finally, appellant Joseph Berger therein had a vested interest in 14 years of practice of psychology and his activities prior to the D.C. Act were in conformity with law. In the instant case no such equitable principle should be applied because respondent herein is governed by the laws of Civil Service and her status was that of provisional which under New York Law does not give respondent herein any vested status. *Koso* v. *Greene,* 260 N.Y. 491, 495 (1933).

It is, therefore, respectfully submitted that the Court below erred in its analysis of job relatedness in that it failed to take into account all of the duties encompassed by the job specification for medical technologist I. Furthermore, appellant Civil Service Commission did all that was reasonably and rationally required to insure content validation to the position of medical technologist I, which was created as a result of the survey conducted by Cresap, McCormack & Paget, infra. *Spurlock* v. *United Airlines, Inc.,* supra; *Hodgson* v. *Greyhound Lines, Inc.,* supra; 29 C.F.R. 1607.5(c)(2)(iii), supra. Finally, respondent was accorded "grandfather rights" in that she was permitted to take a competitive examination for the position of medical technologist I in lieu of having a bachelor of science degree or ASCP certification.

POINT III

The Court below acted in violation of the New York State Civil Service Law in ordering appellant Civil Service Commission to appoint respondent as a provisional medical technologist I and in permitting respondent to take any future civil service examinations for permanent classification as a medical technologist I.

The New York State Civil Service Law, section 20 subd. (1) provides in pertinent part as follows:

> "1. Scope of rules. Each municipal civil service commission shall prescribe, amend and enforce suitable rules for carrying into effect the provisions of this chapter and of section six of article five of the constitution of the state of New York, including rules for the jurisdictional classification of the offices and employments in the classified service under its jurisdiction, for the position classification of such offices and employments, for examinations therefor and for appointments, promotions, transfers, resignations and reinstatements therein, all in accordance with the provisions of this chapter."

Pursuant to Civil Service Law sec. 20 subd. (1), appellant Civil Service Commission set forth the job specifications and duties involved in the position of medical technologist I to include all of the various laboratories in NCMC (M. 113, 187; plaintiff's exhibit #8). The job specification for medical technologist I is clearly not limited to performance in the blood bank laboratory.

While the job specifications for medical technologist I were intended to provide a position of flexibility and availability in all laboratories in NCMC, as a practical matter, when a person was first assigned to a particular

laboratory, he generally remained there. This is the result of growing specialization in the medical technology area. The Court below recognized this problem when it observed, in questioning Mr. Allen Scimeca, as follows:

> "The Court: So you would prefer, I take it, classification such as Medical Technologist in Blood Banking be an examination specifically in the blood banking area?
>
> The Witness: Yes. That would be a fairer way of classifying and judging people.
>
> The Court: But of course you recognize it is difficult or may be difficult to have some specialized classifications and examinations just as an administrative matter, even though it turns out to be unfair?
>
> The Witness: It can be changed. There are other civil service areas that recognize this and changed." (A. 154-155).

Appellant Civil Service Commission has not yet changed its classification of the medical technologist I position into several, more specialized positions to accommodate each of the specialized laboratories in NCMC. But, as the Court below noted, this is a "bureaucratic" problem, and not one of race discrimination.

> "But, my problem is not whether individuals are crushed by the machine or bureaucracy, because that happens all the time. That is not what the court is here for, to rectify every injustice. There must be an injustice as to whites as well as blacks in that hospital. My problem is whether you have made out a case based on race." (A. 182).

Since the current job specification for medical technologist I covers all areas of technology, and there is no spe-

cific position in the Nassau County Civil Service for blood bank technologist, the Court below clearly erred in reclassifying respondent as a provisional medical technologist I. The only demonstrated abilities of the respondent are in the blood bank laboratory, for which there is no specialized classification.

The case at bar involves essentially the classification of jobs under the New York State Civil Service Law, which lies within the broad discretion accorded appellant Civil Service Commission. The Court below was, therefore, without jurisdiction to reclassify respondent into a position whose job specification calls for training and the performance of duties for which respondent has demonstrably no qualifications.

This Court was faced with a parallel problem in *Kirkland* v. *New York State Department of Correctional Services,* 520 F.2d 420 (2d Circuit 1975). It was noted as follows, at 520 F.2d 429:

> "It seems to us that the judiciary should act with great reluctance in undermining traditional civil service concepts; and, if a decision is to be made to subordinate the social purposes of civil service to those of equal employment opportunity, that decision should be made by the people speaking through their legislators."

It should be noted that, if qualified whites were "bumped" from their position on an eligible list because of the appointment of respondent, "constitutionally forbidden reverse discrimination" may result. *Kirkland, id.* The Court below noted this problem when it said as follows:

> "You may have it, but insofar as I can tell here, it may well be discrimination runs the other way." (A. 180).

While it is also clear that federal courts are empowered to examine and pierce state laws in the framework of federal civil rights enactments the case at bar does not present such a factual situation that justifies or warrants such a confrontation. It is respectfully submitted that the Court should defer to the classification for medical technologist I established by appellant Civil Service Commission.

POINT IV

The Court below abused its discretion in awarding back pay to respondent.

42 U.S.C. 2000e-5(g) provides in pertinent part as follows:

> "(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice) or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable."

The policy underlying an award of back pay in a Title VII action has been stated as follows by the Supreme

Court in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975), as follows:

> "The District Court's decision must therefore be measured against the purposes which inform Title VII. As the Court observed in Griggs v. Duke Power Co., supra, 401 U.S., at 429-430, 28 L. Ed. 2d 158, 91 S. Ct. 849, the primary objective was a prophylactic one:
>
> 'It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.'
>
> "Backpay has an obvious connection with this purpose. If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history'." United States v. N.L. Industries, 479 F.2d 354, 379. 45 L. Ed.2d, at 296-297.

The Court in *Albemarle Paper Co.* v. *Moody, supra,* further stated in this regard:

> "As this makes clear, Congress' purpose in vesting a variety of 'discretionary' powers in the courts was not to limit appellate review of trial courts, or to invite inconsistency and caprice, but rather to make possible the 'fashion[ing] [of] the most complete relief possible.'
>
> "It follows that, given a finding of unlawful discrimination, *backpay should be denied only for reasons which,*

> *if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy* and making persons whole for injuries suffered through past discrimination. The courts of appeals must maintain a consistent and principled application of the backpay provision, consonant with the twin statutory objectives, while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases." 45 L. Ed.2d, at 298-299. (emphasis added)

In the case at bar, there is no pattern of discrimination present in appellant hospital, nor was there a finding of any prior discriminatory employment practices on the part of appellants herein (Points I & II, infra; A. 283). Furthermore, in view of the limited holding of the Court below (Point V, infra, A. 304), Congressional policy underlying Title VII as enunciated in *Albemarle Paper Co.* v. *Moody*, infra, would not be frustrated by the denial of an award of back pay to respondent herein.

In addition to a finding of discrimination, the Court should not make an award of back pay unless it finds that, had respondent been a white person instead of a black person, she would have retained the position of medical technologist I. *Day* v. *Matthews*, —— F.2d ——, 11 E.P.D. ¶ 10,725 (D.C. Cir., February 23, 1976). If it is found that respondent would not have been selected as a medical technologist I regardless of her color, she would not be entitled to an award of back pay. *Day* v. *Matthews, id.*, 11 E.P.D., at pg. 7007. The crucial question which must be answered, and which wasn't answered by the Court below, is: Would respondent have been retained as a medical technologist I *but for* the discrimination? In the case at bar, it is clear that respondent would not have been appointed as a medical technologist I even if she were a white person (A. 34).

In view of the foregoing, it is respectfully submitted that the award of back pay to respondent was improper.

POINT V

The Court below abused its discretion in awarding attorney's fees to respondent.

While Congress has permitted courts in Title VII cases to award attorney's fees to successful plaintiffs, 42 U.S.C. 2000e-5(k), the discretion accorded courts is not unbounded. The District Court should be guided by the "private attorney general" doctrine, as enunciated in *Newman* v. *Piggy Park Enterprises,* 390 U.S. 400, 19 L.Ed.2d 1263, 88 S.Ct. 964 (1968), in determining whether or not to award attorney's fees to a Title VII plaintiff. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 45 L.Ed.2d 280 at 295, 95 S.Ct. 2362 (1975); *Fowler* v. *Schwarzwalder,* 409 F.2d 143 (8th Cir. 1973).

Generally, Title VII plaintiffs who obtain an injunction against the employer will be awarded attorney's fees. This is because there is a strong public interest in having injunctive actions brought under Title VII, to eradicate discriminatory employment practices. *Albemarle Paper Co.* v. *Moody, supra,* 45 L.Ed.2d at 295.

Respondent herein does not fall within the "private attorney general" doctrine for the following reasons: First, respondent failed to obtain a preliminary injunction. Second, the ruling by the court below was limited to respondent. The Court below stated as follows:

> "The Court does not rule on the validity of the degree requirement except in the special circumstances of the case before it." (A. 304).

Third, the attorney for respondent provided its services for respondent *pro bonum,* as it does for all its clients. Fourth, there was no finding of racial discrimination by the Court below (A. 283), so that there are no discriminatory practices on the part of appellants which were or could be enjoined.

In light of the foregoing, it is respectfully submitted that respondent does not fall within the purview of the "private attorney general" doctrine as enunciated in *Newman* v. *Piggy Park Enterprises, supra,* and reaffirmed in *Albemarle Paper Co.* v. *Moody, supra.* Therefore, the Court below abused its discretion in awarding attorney's fees to respondent.

CONCLUSION

For the reasons stated above, the order and judgment appealed from should be reversed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARGARET TOWNSEND,

Plaintiff-Appellee,

against

NASSAU COUNTY MEDICAL CENTER: DOCTOR DONALD H. EISENBERG, SUPERINTENDENT, NASSAU COUNTY CIVIL SERVICE COMMISSION: GABRIEL KOHN, Chairman; EDWARD S. WITANOWSKI, EDWARD A. SIMMONS, ADELE LEONARD, Executive Director of Nassau County Civil Service Commission, NEW YORK STATE DEPARTMENT OF CIVIL SERVICE; ESRA H. POSTEN, President of the New York State Civil Service Commission and head of the New York State Civil Service Department,

Defendants-Appellants.

On Appeal From The United States District Court
For the Eastern District of New York

Affidavit of Service By Mail

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

Louis Mark, being duly sworn, deposes and says: That he is over twenty-one years of age: That on the 20th day of April 1976 he served three copies of the attached Brief For Nassau County Defendants-Appellants on Spizz & McEvily, Esqs., Attorneys for Plaintiff-Appellee, by enclosing said copies in a fully post-paid wrapper addressed as follows and depositing same in The United States Post Office maintained at No. 350 Canal Street, New York City, New York.

Spizz & McEvily, Esqs.
73 Main Street
Hempstead, New York 11550

Louis Mark

Sworn to before me this

20th day of April 1976

Quinton C. Van Wynen

QUINTON C. VAN WYNEN
Notary Public, State of New York
No. 24-4087465
Qualified in Kings County
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